

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

IN RE:)
)
IN MONICA TERESA ORDAZ, fdba) Case No. 19-20518-C-7
CENTRAL VALLEY ACCOUNTING, INC.)
)
)
Debtor.) Adv. Pro. 2019-02056
)
PEDRO JULIAN GONZALEZ, dba)
PEDRO J. GONZALEZ, FLC,)
)
Plaintiff,)
v.)
)
MONICA TERESA ORDAZ, and fdba)
CENTRAL VALLEY ACCOUNTING, INC.)
)
Defendants.)
)

MEMORANDUM

Penalties of \$572,165 were imposed on Plaintiff due to Debtor's failure to submit required information returns for four tax years to the Internal Revenue Service. The penalties were merely for post-issuance reporting defects with W-2 Information Returns, even though all W-2 forms were timely issued to employees and all taxes paid. The Plaintiff, who speaks no English, relied on Defendant for compliance with all tax procedures. He seeks a nondischargeable money judgment measured by the legal expense of obtaining remission of some of the penalties, plus the remaining unremitted penalty. The theories sound in fraud and fraud and defalcation while acting in a fiduciary capacity.

This Court finds for plaintiff on both counts and awards the

1 requested damages.

2 Procedure

3 Trial was held before the undersigned Bankruptcy Judge. A
4 Certified Spanish Interpreter simultaneously translated the
5 proceedings. The Plaintiff and Defendant-Debtor testified, as did
6 the Plaintiff's spouse, his tax attorney, and an expert witness.

7
8 Findings of Fact

9 Plaintiff Pedro Julian Gonzalez, who does not speak English,
10 has operated a licensed farm-labor contracting business with up
11 to 1000 employees in Colusa County, California, since about 2003.
12 Gonzalez, himself, also works in the fields alongside his
13 employees. He is assisted in the business by his spouse,
14 Margarita Gonzalez, who likewise has only rudimentary English.

15 From 2004 to 2017, Defendant-Debtor Monica Ordaz, who
16 initially was associated with H.& R. Block but soon began
17 operating independently, performed payroll and employment tax
18 preparation duties. She also did business under the name Central
19 Valley Accounting, Inc., which entity has no articles of
20 incorporation, no directors, and no meetings, and is here deemed
21 a sole proprietorship operating with a fictitious business name.

22 Ordaz has a CTEC license from the State of California to
23 prepare income tax returns and is required to receive 20
24 hours/year of continuing education that covers such topics as
25 federal tax laws and ethics.

26 As time passed, Ordaz became Gonzalezs' trusted interface
27 with the English-speaking world.

28 Ordaz agreed to handle all correspondence with the Internal

1 Revenue Service and the Social Security Administration. She
2 prepared papers to obtain and maintain other necessary business
3 licenses. She reviewed and assisted in a workers' compensation
4 claim that arose. She worked with Gonzalez to communicate with
5 insurance brokers. She assisted Gonzalez in responding to
6 requests from the Occupational Safety and Health Administration.

7 Ordaz regularly invoiced Plaintiff for her services, which
8 invoices were paid regularly by Plaintiff. In 2014, for example,
9 the payments to Ordaz for services totaled approximately \$50,000.

10 Beginning in 2011, an issue arose with the IRS regarding
11 required transmissions to the IRS of reports of W-2 statements
12 that had been issued to employees.

13 There was no contention that required taxes and social
14 security withholding were not actually paid. Rather, the problem
15 was that they were not being correctly reported.

16 For a number of years beginning in 2011, Gonzalez would
17 receive written communications from the IRS regarding the
18 problem. Because he did not read or understand English, Ordaz
19 asked that they be turned over to her to be handled. He did not
20 understand that those IRS letters were notices of deficiencies
21 and notices of intent to impose penalties.

22 Ordaz did not advise Gonzalez of the nature of the problem.
23 She did indicate at one point that there was a "problem with the
24 IRS" but said that it was an IRS mistake, that everything had
25 been done correctly, and that Gonzalez had nothing to worry
26 about.

27 In 2014, Ordaz persuaded Gonzalez to execute a power of
28 attorney in her favor to deal with the IRS on his behalf.

1 Also in 2014, Ordaz persuaded Gonzalez to designate her as
2 his personal representative with the Social Security
3 Administration.

4 When penalties were assessed by the IRS in letters that the
5 Gonzalezs did not understand and that they turned over to Ordaz,
6 Ordaz did not inform them that they were penalty assessments.

7 Margarita Gonzalez testified, credibly, that Ordaz kept
8 reassuring them that "everything was fine" and "done correctly"
9 and that she was handling the issues.

10 Ordaz did not at any time before October 2017 indicate that
11 IRS penalties were threatened or being imposed.

12 Throughout the period 2004-2017, Ordaz submitted regular
13 invoices to Gonzalez, which he paid. The invoices included
14 services for filing W-2s and for communications with the IRS. As
15 noted, the invoices for 2014 were approximately \$50,000.

16 Everything came to a crisis in 2017 when the IRS levied on
17 the Gonzalez bank accounts to collect the penalties.

18 Gonzalez went to the Social Security Administration office
19 in Yuba City, California, and inquired if there was some problem
20 with tax filings and submissions. He learned for the first time
21 that no W-2 information returns had been filed since 2011.

22 The penalties imposed under Internal Revenue Code § 6721
23 were:

24 Tax Year 2011: \$38,640

25 Tax Year 2013: \$23,460

26 Tax Year 2014: \$339,505

27 Tax Year 2016: \$170,560

28 Total: \$572,165

1 Gonzalez engaged tax attorney Ulises Pizano-Diaz, who
2 eventually was able to persuade the IRS to waive the penalties
3 for 2011, 2013, and 2014.

4 Counsel Pizano-Diaz, however, was not successful in
5 obtaining waiver of the \$170,165 penalty for 2016. That penalty,
6 unlike the earlier penalties, was imposed against Gonzalez Farm
7 Labor Services LLC, of which Gonzalez is the sole member.

8 Gonzalez paid counsel Pizano-Diaz \$32,839.84 for his
9 services in obtaining remissions of the penalties for Tax Years
10 2011, 2013, and 2014 and urging remission for Tax Year 2016.

11 12 Jurisdiction

13 Subject-matter jurisdiction is founded on 28 U.S.C.
14 § 1334(b). This is a core proceeding that a Bankruptcy Judge may
15 hear and determine. 28 U.S.C. § 157(b)(2)(I).

16 17 Conclusions of Law

18 Gonzalez contends that Defendant Ordaz obtained money in the
19 form of invoices for services by false pretenses, false
20 representation, or actual fraud as provided by 11 U.S.C.
21 § 523(a)(2)(A).

22 In the alternative, Gonzalez contends Ordaz is liable to him
23 for fraud or defalcation while acting in a fiduciary capacity as
24 provided by 11 U.S.C. § 523(a)(4).

25 26 I

27 Fraud: 11 U.S.C. § 523(a)(2)

28 The § 523(a)(2)(A) exception to discharge applies to a debt

1 for money, property, services, or an extension, renewal, or
2 refinancing of credit, to the extent obtained by false pretenses,
3 a false representation, or actual fraud, other than a statement
4 in writing respecting the debtor's or an insiders financial
5 condition. 11 U.S.C. § 523(a) (2) (A) .

6
7 A

8 The initial question at the threshold is whether a debt for
9 a tax penalty caused by a person who was employed and paid to
10 provide the services that triggered the penalty qualifies as a
11 debt for money, property, or services.

12 That question is here answered in the affirmative. The
13 Defendant was employed and paid to provide, among other things,
14 tax and accounting services for a client with as many as 1000
15 employees. In one year alone, the client paid Defendant \$50,000.
16 The defective performance of those services led to penalties
17 against the client totaling \$572,165. Hence, the client as
18 Plaintiff has a claim for a debt based upon those penalties.

19
20 B

21 Next is the question whether the debt was incurred by false
22 pretenses, false representation, or actual fraud.

23 The standard analysis of false representation equates with
24 the essential elements of the common law tort of intentional
25 misrepresentation. Field v. Mans, 516 U.S. 59, 69-70 (1995).

26 The usual essential elements for a § 523(a) (2) (A) false
27 representation as set forth in the law of the Ninth Circuit in
28 light of Field v. Mans are:

- (1) The Defendant made representations;
- (2) The Defendant knew at the time they were false
- (3) The Defendant made the representations with the intention and purpose of deceiving the creditor;
- (4) The creditor justifiably relied on such representations;
- (5) The creditor sustained the alleged loss and damage as the proximate result of the representations.

Citibank (South Dakota), N.A. v. Eashai (In re Eshai), 87 F.3d 1082, 1086 (9th Cir. 1996).

The facts of this case fit within those essential elements:

(1) Ordaz represented to Gonzalez that the communications from the IRS related to mistakes by the IRS, that everything was fine, and that Gonzalez had nothing to worry about and had no responsibility for the problem; (2) In fact, Ordaz knew that everything was not fine with the IRS; (3) Ordaz made the assurances to keep Gonzalez from inquiring further; (4) Gonzalez, based on his long-term experience of relying on Ordaz for such matters, justifiably relied on her lulling representations; and (5) As a proximate result, Gonzalez sustained the damage of \$572,165 in tax penalties, all but \$170,560 he was able to have remitted only with the assistance of tax counsel to whom Gonzalez was required to pay \$32,839.84 in legal fees.

The Supreme Court has recently clarified that the term "actual fraud" in § 523(a)(2)(A) is a broader concept that does not necessarily require a false representation and, hence, can encompass fraudulent conveyances. Husky Int'l Elecs., Inc. v. Ritz, 578 U.S. 355, 366 (2016).

The potential relevance of Husky for the count under § 523(a)(2)(A) is that, if one were to view this trier of fact's analysis of the Defendant's "representations" as outside the proverbial baseball umpire's strike zone, then such a conclusion

1 would not necessarily be fatal to the exception to discharge.

3 II

4 Breach of Fiduciary Duty: 11 U.S.C. § 523(a)(4)

5 The § 523(a)(4) discharge exception for "fraud or
6 defalcation while acting in a fiduciary capacity" requires proof
7 of a fiduciary capacity and either fraud or defalcation with
8 respect to an express trust. Ragsdale v. Haller, 780 F.2d 794,
9 796 (9th Cir. 1986), citing Davis v. Aetna Acceptance Co., 293
10 U.S. 328, 333 (1934).¹

11 The standard of proof for the § 523(a)(4) discharge
12 exception is preponderance of the evidence. Retz v. Samson (In re
13 Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

14 Whether a relationship is a fiduciary one within the meaning
15 of § 523(a)(4) is a question of federal law. Ragsdale v. Haller,
16 780 F.2d 794, 796 (9th Cir. 1986). Whether a trustee is a
17 fiduciary chargeable under § 523(a)(4) is determined by reference

19 ¹The current understanding of "fraud or defalcation while
20 acting in a fiduciary capacity" requiring in all instances an
21 express trust to exist before the alleged wrongdoing renders the
22 words "fraud or" to be mere surplusage. The Supreme Court's
23 analysis of similar surplusage in Husky, and its invocation of
24 the role of common law in Field v. Mans, may presage a view that
25 the plain language of § 523(a)(4) contemplates two
26 nondischargeable alternatives: "fraud while acting in a fiduciary
27 capacity" not requiring an express trust and "defalcation while
28 acting in a fiduciary capacity" requiring an express trust. Some
courts have started to push back at the strict express trust
requirement in clear fiduciary misconduct situations. Andy Warhol
Found for Visual Arts, Inc. v. Hayes (In re Hayes), 183 F.3d 162
(2d Cir. 1999); In re Cochrane, 124 F.3d 978 (8th Cir. 1997),
cert. denied, 522 U.S. 112 (1998). Nevertheless, for the moment,
courts are left to resort to stretching the meaning of express
trust in ever more tenuous analyses until eventually someone
recognizes the Emperor has no clothes.

1 to state law. Id.

2 The accepted elements of the § 523(a)(4) discharge exception
3 in this instance are: (1) express trust existed between Ordaz and
4 Gonzalez; (2) the debt was caused by Ordaz's fraud or
5 defalcation; and (3) Ordaz was a fiduciary to Gonzalez at the
6 time the debt was created. Otto v. Niles (In re Niles), 106 F.3d
7 1456, 1459 (9th Cir. 1997); Nahman v. Jacks (In re Jacks), 266
8 B.R. 728, 735 (9th Cir. BAP 2001).

9 It is significant that in 2014 Ordaz requested and obtained,
10 first, a power of attorney to deal on behalf of Gonzalez with the
11 Internal Revenue Service and, second, an authorization to act as
12 personal representative of Gonzalez with the Social Security
13 Administration.

14 The power of attorney and the designation as personal
15 representative created a principal-agent relationship that
16 California recognizes as a fiduciary relationship.

17 The evidence is that the IRS penalties of \$562,165 were not
18 imposed on Gonzalez until after Ordaz obtained the Gonzalez power
19 of attorney and the designation as his personal representative.

20 Ordaz was aware of the lack of sophistication of Gonzalez on
21 tax matters and of his near-total reliance upon her, especially
22 in view of his inability to read English and understand notices
23 that were being sent from the IRS.

24 Armed with the power of attorney, Ordaz had a duty to keep
25 Gonzalez apprised of the situation with the IRS. Instead, she did
26 not disclose to him the fact that penalties were being imposed.
27 Rather, she told him that he was not being penalized. The first
28 Gonzalez learned of the actual penalties was in 2017 when

1 enforcement action was taken against his bank accounts. At that
2 point, Ordaz was nowhere to be seen. Gonzalez was forced to hire
3 tax counsel to attempt to extricate him from the predicament.

4 Also relevant to whether there was a fiduciary relationship
5 is the role that Ordaz played as business advisor and translator
6 in other business dealings involving Gonzalez in a fashion that
7 cumulatively adds up to a fiduciary relationship.

8 Applying the facts to the essential elements yields the
9 following conclusions. First, an express trust existed between
10 Ordaz and Gonzalez memorialized by the 2014 power of attorney by
11 which Gonzalez placed in Ordaz his affairs with the Internal
12 Revenue Service and designated Ordaz as his personal
13 representative with the Social Security Administration. Second,
14 the debt was caused by Ordaz's fraud or defalcation in the form
15 of telling Gonzalez that the IRS issues were a mistake by the IRS
16 and that everything was "fine" when, in fact, she knew it was not
17 "fine" and showed reckless disregard when she should have known
18 it was headed to imposition of significant financial penalties in
19 circumstances in which Gonzalez, if Ordaz had honored her duties
20 of loyalty and candor to him, could have remedied the situation.
21 Third, Ordaz was a fiduciary to Gonzalez at the time the debt was
22 created by virtue of the power of attorney and designation as
23 personal representative with the Social Security Administration,
24 and independently, by the structure of her overall relationship
25 with the Gonzalez business in which she assisted in his
26 interfaces with the English-speaking business world.

27 In these circumstances, California courts recognize
28 fiduciary relationships. See, e.g., Stokes v. Henson, 265 Cal.

1 Rptr. 836 (Cal. Ct. App. 1990).

3 III

4 Damages

5 The damages consist of the IRS penalties for not filing
6 information returns that totaled \$572,165 ($\$38,640 + \$23,640 +$
7 $\$339,505 + \$170,560 = \$572,165$). The legal fees expended in
8 obtaining remissions of all penalties except \$170,560 were
9 \$32,839.34 ($\$3,577.18 + \$29,262.66 = \$32,839.84$).

10 The net damages are the sum of the unremitted IRS penalties
11 and the legal fees expended in obtaining remissions from the IRS:
12 \$203,998.34 ($\$170,560 + \$32,839.84 = \$203,998.34$).

14 Conclusion

15 A judgment will be entered awarding Plaintiff Pedro Julian
16 Gonzalez the amount of \$203,998.34 against Defendant Monica
17 Teresa Ordaz, which sum is declared to be excepted from the
18 bankruptcy discharge of Monica Teresa Ordaz by virtue of
19 11 U.S.C. § 523(a)(2)(A) and § 523(a)(4).

21 Dated: September 12, 2024



24 United States Bankruptcy Judge